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No. 559

In the Supreme Court of the United States

OCTOBER TERM, 1962

C. GEORGE SWALLOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 307 F.2d 81 (Pet. 41–48).

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1962 (Pet. 49). An order denying a petition for rehearing was entered on September 5, 1962 (Pet. 50). On October 1, 1962, Mr. Justice White entered an order granting petitioner to and including October 24, 1962, within which to file the petition for a writ of certiorari. The petition was filed on the latter date, and the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether certain statements made by petitioner were properly admitted into evidence as relevant to his intent to evade taxes.

2. Whether petitioner was prejudiced by the testimony of the special agent or the admission into evidence of certain exhibits which summarized his unreported income for the years involved.

3. Whether the trial court properly denied the motion to correct the record with respect to the *voir dire* examination of juror Clarence Lewis.

4. Whether the "leads" rule, promulgated by this Court in *Holland* v. *United States,* 348 U.S. 121, with respect to net worth cases, is also applicable to a "specific items" case.

5. Whether the court of appeals recognized that reliance in good faith upon an accountant who prepares a tax return is a valid defense in a prosecution for tax evasion.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

SEC. 145. PENALTIES.

* * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by

this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

1. On February 16, 1960, a two-count indictment was filed against petitioner in the United States District Court for the District of Colorado, charging him with willful attempts to defeat and evade income taxes due and owing from him and his wife for the calendar years 1953 and 1954, in violation of Section 145 (b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954. The indictment alleged that the joint net income of petitioner and his wife was $15,031.19 for 1953 and $12,652.78 for 1954, whereas there had been reported only $4,551.57 and $1,650 for the two years (R. 2–3).[1] Af-

[1] Citation is to the two-volume "Transcript of Record" in the court of appeals.

ter a jury trial, petitioner was found guilty on both counts and sentenced to concurrent prison terms of one year and one day (R. 3–4). The court of appeals unanimously affirmed (Pet. 41–48).

2. The evidence to support the verdict, as summarized by the court of appeals (Pet. 42–44), is as follows:

Petitioner and one Hershfield, early in 1953, organized the Industrial Gas Company (R. 58), to develop oil and gas properties. Each became an officer of the company and it was agreed each would draw a salary of $1,000 per month (R. 58, 68). Industrial soon commenced business operations and derived its income mostly from the shipment of natural gas through leased pipelines to customers in South Dakota (R. 339). A bank account was opened with petitioner and Hershfield authorized to draw jointly corporate checks upon it (R. 26). Hershfield resigned as president in August 1953 (R. 64–65, 373), and sold his stock to Charles W. Swift who became president in September 1953 (R. 199–200, 373). During August 1953, another corporation bank account was opened by petitioner at the First National Bank of Denver and, after Hershfield resigned, petitioner alone had authority to draw checks upon this corporate account (R. 25).

The government sought to prove that all of the items of alleged unreported income except one, came from this corporate bank account. The government's case was presented on the "specific items" theory whereby the government proceeded to prove, by both direct and circumstantial evidence, each

separate item of alleged unreported income relied upon to make the case (Exs. 108-114).

For the taxable year 1953, the evidence reflected generally three categories of unreported income. The largest single item involved the purchase and sale of a 7½ percent interest in Ore Conversion Company by petitioner, at a profit to him of $4,900 (R. 114–118, 289, 290, 292; Ex. 108). In the second category were three amounts paid directly by the corporation but for the benefit of petitioner. These included $152.90 to Hobson Motor Company for repairs to his automobile (R. 92–95, 298; Ex. 110), $375 to Dr. Levy for rental of the residential property where petitioner lived (R. 46–50, 78–79, 297–298; Ex. 110), and $145 to Public Storage and Fixture Company for rugs and beds (R. 91–92, 297; Ex. 110). The third category covered the amount of $5,362.03, diverted from the corporation during the taxable year by checks payable to Mrs. Swallow; such funds were used thereafter to pay the Swallow family's personal expenses (R. 61–63, 298; Ex. 111). The total unreported income in the three categories was $10,934.93 (R. 301; Ex. 108).

The evidence concerning unreported income for 1954 showed a payment of $345.05 to a man's clothing store out of corporate funds (R. 147, 304, 305; Ex. 114); a check from the corporation to petitioner for $1,000, charged as back salary due him (R. 223, 302, 409; Ex. 112); the payment of principal and interest on a promissory note in the total amount of $5,622.25 by the corporation to petitioner's wife, which note

the government contended was fictitious and did not represent a bona fide loan from the wife to the corporation (R. 302, 321); and, again, numerous instances during that year of payments of corporate funds to Mrs. Swallow's bank account and the use thereafter of such money to pay the family's personal expenses (R. 303–304; Ex. 113). The government's evidence on this count showed unreported income totaling $15,002.78 (R. 304; Ex. 112).

As defenses, petitioner denied that he had failed to report all of his income and affirmatively contended that he did not report all of his allowable deductions (R. 449); urged that Industrial funds paid for his personal benefit were in fact repayments of loans or reimbursements for money he had paid out for the benefit of the corporation (R. 449); and contended that he relied in good faith upon the accountants who prepared his income tax returns (R. 449).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 23–25) that the court of appeals erred in holding that certain statements which he made to government witnesses were admissible as "indicating his intention to evade income taxes and directly proving wilful intent" (Pet. 45). It is readily apparent that these statements revealed a pattern of conduct, "the likely effect of which would be to mislead or to conceal," *Spies* v. *United States*, 317 U.S. 492, 499. This was true of petitioner's statements showing his "concealment of assets" in the name of his wife (R. 272), and his

"covering up sources of income" by living off unreported promotional expenses, instead of salary (R. 272). *Spies* v. *United States, supra,* at 499. Even if this was motivated by a desire to defeat the rights of other creditors besides the government, it is fundamental that "if the tax-evasion motive plays any part * * * the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." *Spies* v. *United States, supra,* at 499.

Nor is there any merit to petitioner's contention that he was prejudiced by the introduction into evidence of a letter he wrote in 1959 to a Mr. Martin, in which he advised Martin to take a deductible tax loss that did not in fact exist, and that he (petitioner) would file an affidavit that the loss actually occurred (R. 410–411). Though petitioner offered no objection to this evidence, he now claims (Pet. 36–37) that this letter, written in 1959, had no bearing on his intent to evade his taxes for the years 1953 and 1954. Such evidence, however, is admissible on the issue of intent and to negative the defense, as in this case, of good faith reliance on accountants. *United States* v. *Alker,* 260 F. 2d 135, 157 (C.A. 3d), certiorari denied, 358 U.S. 817; *United States* v. *Taylor,* 305 F. 2d 183, 185–186 (C.A. 4th), certiorari denied, November 5, 1962, No. 281 Misc., this Term.

2. Petitioner asserts (Pet. 25–28; 31–34) that various conclusions of the special agent were erroneous and that the summaries of the evidence which he

prepared may have misled the jury. In making this argument, petitioner does no more than complain that the jury did not accept his theory of the case. At the trial, petitioner did not object to the admission of the summaries (R. 291, 295), except to note that there were certain matters of defense pertaining thereto (R. 294). Petitioner then cross-examined the special agent with respect to both his testimony and the items contained in the summaries (R. 308, 312–313, 317, 323, 325). Under the circumstances, the court properly left to the jury the determination of the weight to be given to both the summaries and the testimony (Pet. 45).

Petitioner further alleges (Pet. 38–39) that the decision of the court of appeals (Pet. 45–46) conflicts with the decision in *Steele* v. *United States*, 222 F. 2d 628, 630 (C.A. 5th), holding that such summaries of the evidence "were not under any circumstances entitled to be taken to the jury as exhibits." Aside from the fact that *Steele* has probably been overruled *sub silentio* by *Lloyd* v. *United States*, 226 F. 2d 9, 16 (C.A. 5th), it is clear that this Court, in *Holland* v. *United States*, 348 U.S. 121, 127–128, sanctioned the use of such summaries in the jury room, while warning that the jury should be carefully instructed as to their use. In the instant case, as the court of appeals observed (Pet. 45–46), "the trial judge carefully advised the jury concerning the purpose" of the summaries at the time they were introduced (R. 294), "and again, by a separate instruction at the conclusion

of the case, correctly instructed concerning their nature and use" (R. 438).

3. Petitioner's contention (Pet. 28) that the juror, Clarence Lewis, incorrectly responded to the questions at the *voir dire* examination concerning his acquaintance with a prospective defense witness, Mr. H. J. Brakhage, is refuted by the affidavit of that juror (R. 8). Moreover, even if petitioner's assertion that Lewis answered incorrectly be true, no prejudice has been shown, since Brakhage was listed as a witness for the defense, and was not called to testify at the trial (R. 444). The court of appeals correctly upheld the trial court's denial of the motion to correct the record (Pet. 46–47).

4. Petitioner, citing the "lead rule" enunciated by this Court in *Holland* v. *United States*, *supra*, at 135–136, with respect to net worth cases,[2] now urges that this rule be applied in "specific items" cases. The

[2]The rationale of the "lead rule", as stated by this Court in *Holland* is that: "While sound administration of the criminal law requires that the net worth approach—a powerful method of proving otherwise undetectable offenses—should not be denied the Government, its failure to investigate leads furnished by the taxpayer might result in serious injustice. * * * When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer—**leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the Government** fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury."

court of appeals rejected this contention as follows (Pet. 47):

> Counsel for appellant seeks to apply the so-called "lead rule" to this case. He cites no authorities in support of this contention. Our own research on this point shows such rule to have been applied only in "net worth" cases and never in a "specific item" case. The reasons for its application in a "net worth" case certainly are not present in a "specific item" case. * * *

The holding of the court of appeals on this point is correct. The "specific items" method involves the proof of omissions from gross income by direct evidence of particular items omitted. In net worth cases, however, since an indirect method of proof is involved, the cogency of the government's case "depends upon its effective negation of reasonable explanations" furnished by the taxpayer, who seeks to attribute his net worth increases to a nontaxable source of income. *Holland* v. *United States, supra,* at 135.

Moreover, the specific illustrations cited by petitioner (Pet. 28–31), far from being "leads," were matters of defense comprising his claim at trial that he was entitled to deductions in addition to those claimed by him on his returns. The government introduced evidence to refute these contentions (R. 283, 309–312, 323–325, 340–341, 390–391, 393–394, 397–398, 424–425; Ex. 83), which disposes of petitioner's reliance (Pet. 37–38) on *Small* v. *United States,* 255 F. 2d 604 (C.A. 1st), and the jury obviously resolved these issues of fact in the government's favor.

5. It is indeed true, as petitioner states (Pet. 34), that reliance in good faith upon an accounting firm that prepares the returns is a valid defense. But petitioner asserts that the court of appeals, "by its silence" on this point (Pet. 34), was unaware of this legal principle. Petitioner has overlooked the portion of the court's opinion which recognized that one of his defenses was reliance "in good faith upon the accountants who prepared his income tax returns" (Pet. 44). The court commented (Pet. 45):

> It is true, the defendant, by his own testimony, attempted to * * * sustain his good faith reliance upon those who prepared the questioned returns. But viewing the record as a whole, we must conclude that the evidence adduced by both sides presented questions of fact including the guilt or innocence of the defendant.

CONCLUSION

Further review by this Court is unwarranted. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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